No. 80-1437

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In the Supreme Court of the United States

OCTOBER TERM, 1981

ARMY AND AIR FORCE EXCHANGE SERVICE,
PETITIONER

v.

ARTHUR EDWARD SHEEHAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a discharged military exchange employee who was appointed to his position may bring a civil action for monetary damages against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2), predicated upon an implied-in-fact contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 619 F.2d 1132. The order of the district court (Pet. App. 17a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a-19a) was entered on June 27, 1980, and a petition for rehearing was denied on September 26, 1980 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed, after an extension, on February 23, 1981, and was granted on October 5, 1981 (J.A. 48). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. 1346(a)(2), provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

The pertinent regulations are set forth at Pet. App. 22a-35a and Br. in Opp. 2-6.

STATEMENT

In 1962, respondent was appointed, pursuant to Army and Air Force regulations (AR 60-21/AFR 147-15) (Pet. App. 22a-25a), to a position with the Army and Air Force Exchange Service (AAFES) (J.A. 3, 32). He was later designated by the AAFES commander for participation in the Service's Executive Management Program (EMP) (J.A. 3-4, 32), under which AAFES executive employees

enjoy certain special benefits but may be transferred to any AAFES facility in this country or abroad.[1]

In 1975, while respondent was serving as a shopping center manager at Fort Jackson, South Carolina, local police arrested him at home and seized quantities of amphetamine tablets; phencyclidine hydrochloride, a chemical used in the manufacture of LSD; methylenedioxy amphetamine; and 40 marijuana plants. Pursuant to a plea bargain, he pleaded guilty to four counts of simple possession of the drugs in question and was sentenced to 18 months' probation and a $1,000 fine (J.A. 5, 11-12, 17, 23-24, 32).

After pleading guilty to the criminal charges, respondent received advance written notice of separation for cause based upon conduct off the job that reflected discredit upon the AAFES and rendered his retention incompatible with the best interests of the Service (J.A. 5, 32, 11-13). The letter notifying respondent of his dismissal was signed by James Stapleton, the AAFES general manager for the Piedmont Area, but because of respondent's participation in the Executive Management Program, prior approval had been obtained from the AAFES commander, General C.W. Hospelhorn (J.A. 5, 11, 13,

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[1] The Executive Management Program is intended to meet the AAFES's need for "highly qualified and dedicated executive employees" available for transfer to any AAFES facility. AR 60-21/AF 147-15, ch. 5, § II, ¶ 5-6 (Br. in Opp. 2-6). Nomination and designation to EMP status at appropriate grade levels are controlled by the AAFES commander. EMP employees are obligated to accept transfer throughout the worldwide AAFES but enjoy special retention, insurance, and retirement benefits. EMP status may be withdrawn for gross inefficiency or for cause, including conduct off the job reflecting discredit on the AAFES. See AR 60-21/AFR 147-15, ch. 5, § II, ¶ 5-9.

32). After an investigation of respondent's conduct, Stapleton issued a final notice of separation (J.A. 5-6, 17-19, 32). Respondent appealed, in accordance with AAFES procedures,[2] and the matter was referred to a hearing examiner (J.A. 6, 32). The hearing examiner concluded that the actions taken by the AAFES complied with the pertinent laws and regulations, but he recommended that respondent be reinstated in his former grade and transferred to an assignment outside the Southeast Exchange Region (J.A. 6-7, 20-30, 32-33). However, General Hospelhorn, acting as the appellate authority, disagreed with the hearing examiner and denied respondent's appeal (J.A. 7, 39; Pet. App. 4a).

Respondent then sought reconsideration in a letter addressed to the new AAFES commander, General Bobby W. Presley (J.A. 40-41). Respondent alleged that his separation was contrary to AAFES rules and regulations and that he had been denied due process of law because his appeal had been decided by General Hospelhorn, who had earlier approved his dismissal (*ibid.*). After receiving respondent's letter, General Presley reopened the case and referred it to General Charles E. Buckingham, the chairman of the AAFES board of directors (J.A. 42-43). At General Buckingham's request, the administrative record was reviewed by the Air Force Judge Advocate General, who concluded that there was sufficient evidence showing that respondent's conduct reflected discredit upon the AAFES and that his retention was incompatible with the best interests of the Service (J.A. 44-45). Acting as the

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[2] These procedures are set forth in Exchange Service Bulletin No. 247 (15-52) (July 2, 1975) (Pet. App. 25a-35a).

appellate authority, General Buckingham then denied respondent's appeal (J.A. 46).

In the meantime, respondent had filed suit against the AAFES in the United States District Court for the Northern District of Texas, invoking the court's jurisdiction under the Administrative Procedure Act, 5 U.S.C. 701-706; the Tucker Act, 28 U.S.C. 1346 (a)(2); the mandamus statute, 28 U.S.C. 1361; and the Constitution (J.A. 3). In count one of his complaint, respondent alleged that General Hospelhorn violated AAFES regulations and the Due Process Clause when he decided respondent's initial appeal after having previously approved respondent's dismissal (J.A. 3-8). In count two, respondent alleged that the denial of his appeal was "[a]rbitrary," "capricious," "an abuse of discretion," "unsupported by substantial evidence," "unwarranted by the facts of [the] case," and in violation of unspecified laws and constitutional provisions (J.A. 8-9). Respondent sought injunctive relief and money damages, including back pay (J.A. 9-10). The district court dismissed the action for lack of subject matter jurisdiction (Pet. App. 17a).

The court of appeals reversed (Pet. App. 1a-16a). It held that jurisdiction with respect to respondent's monetary claims was furnished by the Tucker Act, 28 U.S.C. 1346(a)(2), which confers upon the district courts jurisdiction over certain civil claims against the United States, including those not exceeding $10,000 and founded upon express or implied contracts with the AAFES (Pet. App. 5a-9a). In response to the government's argument that respondent had served as an appointed employee rather than pursuant to contract, the court observed (Pet. App. 8a; emphasis in original & footnote omitted):

> Even if the regulations label the *commencement* of Sheehan's employment as pursuant to "appointment," we do not think that ends the inquiry. Other regulations provide that an AAFES employee may be separated for cause only under certain conditions and provide for administrative appeal from the separation decision. These latter regulations manifest the understanding of the parties concerning discharge procedures while Sheehan *continued* in AAFES employment. Accordingly, the regulations were part of a collateral implied in-fact contract between Sheehan and the AAFES that the AAFES would adhere to the regulations in its dealings with him.

The court acknowledged that respondent's complaint made no reference to an implied contract, but it held that "[t]he allegation that [respondent's] discharge violated controlling regulations was * * * equivalent to an allegation of breach of an implied-in-fact contract" (*id.* at 9a).[3]

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[3] The court of appeals also held that the district court had subject matter jurisdiction over respondent's claims for nonmonetary relief pursuant to 28 U.S.C. 1331 and that the requisite waiver of sovereign immunity was provided by the 1976 amendment to the Administrative Procedure Act, 5 U.S.C. 702 (Pet. App. 10a-15a). The government did not seek review of that holding (Pet. 4 n.4).

ARGUMENT

THE DISTRICT COURT LACKED JURISDICTION TO ENTERTAIN RESPONDENT'S CLAIM FOR MONEY DAMAGES BASED UPON HIS ALLEGEDLY WRONGFUL DISCHARGE FROM AN APPOINTED POSITION WITH THE ARMY AND AIR FORCE EXCHANGE SERVICE

A. Introduction and Summary of Argument

This case concerns the jurisdiction of the federal courts to entertain suits for money damages brought against the military exchange services by appointed civilian employees who claim to have been wrongfully discharged. The military exchanges are "instrumentalities of the United States" and share the government's sovereign immunity. *United States* v. *Mississippi Tax Commission*, 421 U.S. 599, 606 (1975). Cf. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942) (military exchanges are "arms of the Government" and "integral parts of the War Department"). Consequently, jurisdiction with respect to suits against the exchanges exists only if sovereign immunity has been waived, for as this Court recently reiterated in *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980):

> It is elementary that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941).[4]

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[4] The question of sovereign immunity, which is itself jurisdictional, and the separate question of Tucker Act jurisdiction (see *United States* v. *Testan*, 424 U.S. 392, 398 (1976)) happen to be the same in the instant case. As noted above (page 5, *supra*), a waiver of sovereign immunity may be based upon a contract with the United States, and the court of ap-

The power to waive sovereign immunity is vested in Congress (*United States* v. *Testan*, 424 U.S. 392, 399 (1976)), and "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *United States* v. *Mitchell*, *supra*, 445 U.S. at 538, quoting *United States* v. *King*, 395 U.S. 1, 4 (1969). It follows that a valid waiver may be found only in a constitutional provision or statute specifically conferring the right to recover money damages from the United States (*United States* v. *Testan*, *supra*, 424 U.S. at 401-402); in a regulation specifically granting such a right (*ibid.*) and promulgated pursuant to a statute expressly authorizing the waiver (see *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940); *United States* v. *Shaw*, 309 U.S. 495, 500-501 (1940); *Munro* v. *United States*, 303 U.S. 36, 41 (1938)); or in a contract with the United States entered into by an entity or person possessing "specific authority * * * to make an agreement obligating the United States to pay money * * *." *Kania* v. *United States*, 650 F.2d 264, 268 (Ct. Cl. 1981), cert. denied, No. 81-246 (Oct. 13, 1981). See also, *e.g.*, *Porter* v. *United States*, 496 F.2d 583, 587 (Ct. Cl. 1974); *American-Foreign Steamship Corp.* v. *United States*, 291 F.2d 598, 607 (2d Cir.), cert. denied, 368 U.S. 895 (1961).

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peals relied upon the existence of such a contract. The Tucker Act confers jurisdiction on the district courts (if the amount in controversy does not exceed $10,000) and on the Court of Claims for claims "founded * * * upon any express or implied contract with the United States." 28 U.S.C. 1346(a)(2). Thus, if no such contract exists, as we maintain, jurisdiction is lacking both because sovereign immunity has not been waived and because the terms of the Tucker Act have not been met.

In the present case, the court of appeals failed to identify any constitutional provision, statute, or regulation containing the requisite waiver, and it seems clear that none exists. Respondent claimed (J.A. 7, 8) that his discharge violated the Due Process Clause, but that provision does not waive the government's immunity from damages liability. In *United States* v. *Testan*, *supra*, 424 U.S. at 400, this Court rejected the argument that "the Tucker Act fundamentally waives sovereign immunity with respect to any claim invoking a constitutional provision." Later that Term, in *United States* v. *Hopkins*, 427 U.S. 123 (1976), a former AAFES civilian employee who alleged that he was wrongfully discharged contended that his due process claims were enforceable under the Tucker Act (*id.* at 130), but this Court noted that *Testan* foreclosed that contention (*ibid.*). Thus, *Testan* and *Hopkins* conclusively establish that the Due Process Clause itself does not waive the government's sovereign immunity from damages liability. See *Carruth* v. *United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980).

Respondent also alleged (J.A. 7, 8-9) that his discharge violated AAFES regulations, but neither the regulations governing employment in the AAFES nor the statutes pursuant to which those regulations were promulgated create a right to monetary relief. The statutes (10 U.S.C. 3012, 8012) authorize the Secretaries of the Army and Air Force to conduct the affairs of their respective departments but do not empower them to waive sovereign immunity. The regulations (AR 60-21/AFR 147-15) (Pet. App. 22a-25a) specify discharge procedures but do not create a right to damages for wrongful discharge. This Court considered those very regulations in *Hopkins* (427 U.S. at 127-128) and implicitly held that they do not waive sovereign immunity. Indeed,

not only do the statutes and regulations governing employment in the AAFES fail to create a right to money damages for wrongful discharge, but in 5 U.S.C. (Supp. III) 2105(c), Congress explicitly denied that right to exchange service personnel by excluding them from the coverage of laws administered by the Office of Personnel Management, including the Back Pay Act, 5 U.S.C. (& Supp. III) 5595 *et seq.*[5] As the Court remarked in *United States* v. *Testan*, *supra*, 424 U.S. at 404, in response to the claim of federal employees that implicit waivers of sovereign immunity could be found in various federal employment statutes:

> [I]f the respondents were correct in their claims * * * many of the federal statutes—such as the Back Pay Act—that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous.

Nor can a right to damages in this case be founded upon an express or implied contract. Respondent did not allege the existence of a contractual relationship in his complaint (J.A. 3-10). Nonetheless, the court of appeals based its holding upon "a collateral implied in-fact contract between [respondent] and the AAFES that the AAFES would adhere to [its regulations concerning discharge procedures] in its dealings with him" (Pet. App. 8a).

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[5] The Back Pay Act is administered by the Office of Personnel Management (see 5 U.S.C. (Supp. III) 5596(c)). The Act permits an employee to recover wages lost due to "an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part" of the compensation to which he was otherwise entitled. 5 U.S.C. (Supp. III) 5596(b). See also 5 C.F.R. 550.801 *et seq.*

The decision below cannot be squared with this Court's decisions in *Hopkins* and *Testan*. In *Hopkins*, an action for money damages filed by a discharged AAFES employee, the Court carefully analyzed the exchange service regulations and drew a sharp distinction between two separate categories of exchange service employees: "ordinary" employees, who are appointed to their positions, and outside contractors who perform jobs such as window cleaning and janitorial services. The Court's implicit holding—that only employees in the latter category could sue for money damages—is irreconcilable with the court of appeals' ruling, which finds that respondent (and presumably all other exchange service appointees) entered at the time of appointment into an implied-in-fact contract under which the exchanges agreed to abide by their regulations. Moreover, respondent, who held an executive position with the AAFES, has not claimed (and the court below did not find) that he was employed under one of the service contracts described in *Hopkins*.

Similarly, in *Testan*, federal employees asserted violations of the Classification Act, 5 U.S.C. 5101 *et seq.*, and invoked the jurisdiction of the Court of Claims under the Tucker Act, 28 U.S.C. 1491. This Court held that their claims against the United States for money damages were barred by sovereign immunity because there was no provision of law expressly creating a right to monetary relief. Under the reasoning of the court below, however, those employees would have been entitled to maintain their suit by virtue of an implied-in-fact contract under which their employer agreed to follow the statutes in question.

Finally, the court of appeals' decision is contrary to basic principles of contract law. That decision

confuses an implied-in-fact contract with a quasi-contract or contract implied in law. An implied-in-fact contract is an actual agreement between the contracting parties, inferred from the parties' words and conduct. By contrast, a quasi-contract or contract implied in law is not an agreement between the parties but an obligation imposed by a court for equitable reasons and without reference to the parties' intent. Since the court below made no reference to the parties' intent in finding that a "contract" existed between respondent and the AAFES, it is clear that the court was relying upon a quasi-contract or contract implied in law. The Tucker Act, however, does not provide jurisdiction for claims predicated upon such obligations, and therefore the district court lacked jurisdiction with respect to respondent's claims for money damages.

B. Because Respondent's Employment with the AAFES was Pursuant to Appointment Rather Than Contract, His Discharge Could Not Have Constituted a Breach of Contract

Before 1970, it was settled that the federal courts lacked jurisdiction to entertain civil actions against the United States based upon express or implied contracts with the military exchanges. Then, as now, the Tucker Act conferred jurisdiction with respect to civil actions against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1491. However, in *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942), this Court stated that although the Army Post exchanges were "arms of the Government

deemed by it essential for the performance of governmental functions" and "integral parts of the War Department," the Government had assumed "none of the financial obligations of the exchange." Relying upon that observation, the Court of Claims and some district courts had held that claims against the exchange services were not claims against the United States and that jurisdiction under the Tucker Act was therefore lacking. See, *e.g.*, *Kyer* v. *United States*, 369 F.2d 714 (Ct. Cl. 1966), cert. denied, 387 U.S. 929 (1967); *Bailey* v. *United States*, 201 F. Supp. 604 (D. Alaska 1962); *Pulaski Cab Co.* v. *United States*, 157 F.Supp. 955 (Ct. Cl. 1958); *Borden* v. *United States*, 116 F.Supp. 873 (Ct. Cl. 1953).

In 1970, Congress amended the Tucker Act to remove this perceived inequitable "loophole."* The following identical language was added both to 28 U.S.C. 1491, which confers jurisdiction upon the Court of Claims, and 28 U.S.C. 1346(a)(2), which confers concurrent jurisdiction upon the district courts for claims not exceeding $10,000 (Pub. L. No. 91-350, Section 1, 84 Stat. 449):

> For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

In *United States* v. *Hopkins*, *supra*, the Court considered the effect of this amendment on monetary claims advanced by discharged military exchange em-

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* See S. Rep. No. 91-268, 91st Cong., 1st Sess. 2 (1969); H.R. Rep. No. 91-933, 91st Cong., 2d Sess. 2 (1970).

ployees. Hopkins, a former employee of the AAFES who claimed to have been wrongfully discharged, invoked the 1970 amendment and sued in the Court of Claims for back pay and allowances. Relying upon a Court of Claims decision holding that an AAFES civilian employee was not a "Federal employee" (*Keetz* v. *United States*, 168 Ct. Cl. 205 (1964)), Hopkins contended that his relationship with the AAFES was therefore "contractual," just like the relationship between employers and employees in the private sector. *Hopkins* v. *United States*, 513 F.2d 1360 (Ct. Cl. 1975). The government maintained, on the other hand, that exchange employees served by appointment rather than by contract and that consequently Hopkins' wrongful discharge claim was not within the purview of the Tucker Act amendment. The Court of Claims accepted Hopkins' argument, reasoning that "since [he was] not a Federal employee his relationship with the AAFES [was] governed by contract principles" (513 F.2d at 1366). This Court granted certiorari to resolve the conflict between the decision of the Court of Claims and the Fifth Circuit's holding in *Young* v. *United States*, 498 F.2d 1211 (1974), that the 1970 amendment was not intended to extend Tucker Act jurisdiction to employee discharge cases but was meant solely for the benefit of commercial contractors who did business with the exchanges. *United States* v. *Hopkins*, *supra*, 427 U.S. at 124.

This Court rejected the reasoning of both lower courts. Disagreeing with the Fifth Circuit, the Court held that the amended statute "is applicable to employment contracts as well as those for goods or other services" (427 U.S. at 126). But the Court also rejected the Court of Claims' "determination that AAFES employees could *never* serve by appointment"

(*id.* at 130; emphasis in original). After carefully analyzing the statutes and regulations governing the AAFES,[7] the Court observed that the Service's "ordinary employees are deemed employees of an instrumentality of the United States, and hold their positions by *appointment*" (*id.* at 127; emphasis in original). The Court added, however, that a separate regulation (AR 60-20/AFR 147-14, ch. 4, §§ II and III (Mar. 21, 1974)) provided for a "process under which a person may be employed by contract" (427 U.S. at 128-129). Such service contracts, the Court noted, could pertain to "services performed off a military installation and 'direct services such as janitorial and window cleaning service' " (*id.* at 129, quoting AR 60-20/AFR 147-14, App. A, ¶ A-6*e*). Noting that a regulation in effect at the time of Hopkins' discharge forbade the exchanges from entering into service contracts with exchange employees, the Court added that the regulatory scheme "clearly distinguished between employment pursuant to appointment and employment pursuant to contract" (*id.* at 129).[8]

While vacating the portion of the Court of Claims' judgment "deciding that [Hopkins] held his employment position by virtue of an express or implied contract, rather than by appointment" (427 U.S. at 130-

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[7] The regulations to which the Court referred are AR 60-21/AFR 147-15, the same regulations that governed respondent's employment with the AAFES (Pet. App. 7a-8a & n.8, 22a-25a).

[8] This regulation is still in effect. The Court also observed that when Congress amended the Tucker Act in 1970 it did not change any of the provisions of the United States Code dealing with exchange employees or require that the exchanges employ all persons pursuant to contract. 427 U.S. at 129.

131), the Court held that Hopkins' "allegation that his discharge constituted a breach of a contract of employment was sufficient * * * to withstand the Government's motion to dismiss the complaint on the grounds of lack of jurisdiction in the Court of Claims" (*id.* at 130). The case was therefore remanded to the Court of Claims with instructions that "the question of whether [Hopkins] was employed by virtue of a contract or by appointment" "depends upon an analysis of the statutes and regulations previously described in light of whatever evidence is adduced on remand as to plaintiff's particular status in this case" (*ibid.*).[9]

The decision in *Hopkins* leaves no room for the decision of the court of appeals in the present case. *Hopkins* drew a sharp distinction between two discrete classes of exchange service employees: "ordinary employees," who are appointed to their positions, and employees who work under service contracts. The plain implication of the Court's opinion is that if Hopkins were found on remand to be an "appointed" employee, rather than a contract employee, there would be no contractual relationship on which to base Tucker Act jurisdiction, and Hopkins' action would have to be dismissed. In the present case, respondent has never claimed—and the court below did not hold—that he worked pursuant to one of the service contracts authorized by AAFES regu-

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[9] Hopkins' suit was settled on remand, and therefore no further inquiry was made into his employment status. In subsequent cases, however, the Court of Claims has held that AAFES employees appointed pursuant to the regulations (AR 60-21/AFR 147-15) considered in *Hopkins* cannot bring suit under the Tucker Act for wrongful discharge. See, *e.g.*, *Richardson* v. *United States*, 214 Ct. Cl. 757 (1977); *Spooner* v. *United States*, 211 Ct. Cl. 312 (1976).

lations and discussed in *Hopkins*. Furthermore, it is apparent that respondent's position, which entailed managerial and supervisory responsibilities, was of an entirely different kind from those of service contract employees, who provide janitorial, window-cleaning, and other services commonly furnished by outside contractors.

In addition, the decision below blurs the clear distinction noted in *Hopkins* between "appointed" and "contract" employees. According to the court of appeals, even if respondent were appointed to his position with the AAFES (as he clearly was), he simultaneously entered into an implied contract with the Service "concerning discharge procedures while [he] *continued* in AAFES employment" (Pet. App. 8a; emphasis in original). Such a hybrid cannot exist under the regulatory scheme that this Court analyzed and described in *Hopkins* and that remains in effect today. Nor is it compatible with the long line of authority holding that ordinary government employees do not work under "contract." See, *e.g.*, *Taylor and Marshall* v. *Beckham*, 178 U.S. 548, 577 (1900); *Crenshaw* v. *United States*, 134 U.S. 99, 104-108 (1890); *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867); *Butler* v. *Pennsylvania*, 51 U.S. (10 How.) 402, 416-418 (1851); *Kania* v. *United States*, *supra*, 650 F.2d at 268; *Shaw* v. *United States*, 640 F.2d 1254, 1260 (Ct. Cl. 1981); *Urbina* v. *United States*, 428 F.2d 1280, 1284 (Ct. Cl. 1970).

Indeed, if the decision below were correct, an implied-in-fact contract similar to that found in the present case must have existed in *Hopkins* as well. The implied contract identified by the court of appeals was not found to have arisen because of any

special agreement made between respondent and the AAFES or because of any facts peculiar to respondent's case. Instead, it was found to have been created solely by virtue of the AAFES regulations governing discharge procedures (see Pet. App. 8a-9a). It would seem to follow, therefore, that every other AAFES appointee, including Hopkins, was a party to a similar contract. But if that were true, the terms of this Court's remand in *Hopkins* would be inexplicable. And this inconsistency cannot be explained on the ground that the question of such an implied contract was not before this Court in *Hopkins* but was presented to the court below. Hopkins, unlike respondent, at least alleged in his complaint that he had entered into a contract with the AAFES.

Respondent has sought (Br. in Opp. 6, 12, 13) to distinguish his case from *Hopkins* by pointing out that he participated in the AAFES Executive Management Program. That distinction, however, is of no significance for present purposes, and the court of appeals placed no reliance upon it. The regulations governing the Executive Management Program are part of the regulations governing appointed AAFES employees (AR 60-21/AFR 147-15, ch. 5, § II), and there is nothing in those regulations to suggest that an appointed employee is converted into a contract employee upon entry into the program. To the contrary, employees in the program are "nominated," "selected," and "designated" for participation (AR 60-21/AFR 147-15, ch. 5, § II, ¶¶ 5-7, 5-8) (Br. in Opp. 2)—hardly the terms usually employed when referring to the formation of a contract.

To be sure, a participant in the Executive Management Program must acknowledge "in writing that he understands and accepts the conditions of the EMP,

as prescribed by the Commander, AAFES." AR 60-21/AFR 147-15, ch. 5, § II, ¶ 5-7(b) (Br. in Opp. 2). But analogous written acknowledgments must be executed by many government employees who do not work under contract, including persons who enlist in the military. See *United States* v. *Larionoff*, 431 U.S. 864, 869 (1977). The signing of such an acknowledgment is not proof of a contractual relationship.

Respondent has also suggested (Complaint, ¶ 5; (J.A. 4) that his entry into the Executive Management Program was pursuant to contract because he obtained certain special benefits in exchange for incurring certain special obligations. Again, however, many appointed positions, in all branches of government, involve a similar trade-off. If this factor were sufficient to convert the status of a government employee to one serving pursuant to a contract, the distinction recognized in *Hopkins* between appointed and contract employees would disappear.

C. Because Respondent's Complaint Was Based Upon Alleged Violations of the Due Process Clause and AAFES Regulations, None of Which Waive Sovereign Immunity, His Claims For Money Damages Are Barred

The decision of the court of appeals is also incompatible with this Court's decision in *United States* v. *Testan*, *supra*. In *Testan* two civilian trial attorneys with the Department of Defense whose positions were subject to the Classification Act, 5 U.S.C. 5101 *et seq.*, filed suit in the Court of Claims alleging that they had been misclassified at the GS-13 rather than the GS-14 level. They sought reclassification and money damages for the period of their allegedly wrongful classification.

This Court held that the United States had not waived sovereign immunity with respect to the plaintiffs' suit and consequently ordered its dismissal. The Court first rebuffed the suggestion that the Tucker Act provided the requisite waiver, stating that the Act "is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages" (424 U.S. at 398). For similar reasons, the Court also found no merit in a variation of the same argument, *i.e.*, that the Tucker Act "waives sovereign immunity with respect to any claim invoking a constitutional provision or a federal statute or regulation" (*id.* at 400). The Court specifically rejected "the argument * * * that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation" (*id.* at 401) and the argument that "the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages * * *" (*ibid.*). The Court refused "to tamper with [the] established principles" requiring that a constitutional provision, statute, or lawful regulation expressly confer the right to obtain monetary relief (*id.* at 400). Finally, the Court concluded that the requisite waiver could not be found in the Classification Act (*id.* at 398-405). Noting that the Classification Act contains "substantive standards for grading particular positions" and procedural rules "to ensure that those standards are met" (*id.* at 399), the Court held that the Classification Act did not waive sovereign immunity because it did not expressly make the United States liable for pay lost through allegedly improper classifications (*id.* at 399-400).

The court of appeals' analysis cannot be reconciled with these established principles. In both *Testan* and the present case, aggrieved federal employees brought suit against the United States for money damages claiming violations of laws dealing with personnel matters. In both cases, jurisdiction with respect to the monetary claims depended upon the Tucker Act. In neither case was there a constitutional provision, statute, or regulation expressly granting a right to monetary relief. Accordingly, this Court's decision in *Testan* that sovereign immunity had not been waived dictates a similar result here.

Of course, *Testan* differs from the present case in several particulars, but none is controlling for present purposes. First, the employees in *Testan* alleged violations of the Classification Act and regulations promulgated thereunder, whereas respondent claimed violations of AAFES personnel regulations. What is significant, however, is that in neither case did the provisions allegedly violated expressly grant a right to recover money damages. Second, the employees in *Testan* brought suit in the Court of Claims under 28 U.S.C. 1491, whereas respondent filed his action in the district court under 28 U.S.C. 1346(a)(2). In both cases, however, jurisdiction of the claims for money damages depended upon provisions conferring jurisdiction with respect to civil actions against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States * * *." It is settled that the jurisdictional grants contained in those provisions are identical, except for the $10,000 limit contained in 28 U.S.C. 1346(a)(2). *Richardson* v. *Morris*, 409 U.S. 464, 466 (1973); *United States* v. *Sherwood*, 312 U.S. 584, 591 (1941).

Finally, the employees in *Testan* did not "rest their claims upon a contract" (424 U.S. at 400), whereas the court of appeals construed respondent's complaint as alleging the breach of an implied-in-fact contract (Pet. App. 9a). However, this apparent distinction between the two cases is illusory. As previously noted, respondent's complaint did not allege a breach of contract, but the court of appeals held that "[t]he allegation that the discharge violated controlling regulations was * * * equivalent to an allegation of breach of an implied-in-fact contract" (*ibid.*). By that reasoning, the complaint in *Testan*, which alleged violations of the governing statutes and regulations, must have alleged a similar breach of contract. Instead, the court of appeals' analysis would convert virtually every federal employee claim based on a violation of employment statutes or regulations into a contract claim. This result would evade the long-settled restriction on waivers of sovereign immunity reiterated in *Testan* and would render statutes such as the Back Pay Act superfluous. See 424 U.S. at 404.

D. The Obligations Found By the Court of Appeals To Have Been Incurred by the AAFES Arose From a "Quasi-Contract" or "Contract Implied in Law," Rather than a "Contract Implied in Fact"

Not only is the decision of the court of appeals in conflict with *Hopkins* and *Testan*, but it does violence to rudimentary principles of contract law. The decision below confuses a "quasi-contract" or a contract "implied in law" with a contract "implied in fact." The Tucker Act does not confer jurisdiction with respect to "quasi-contracts" or contracts "im-

plied in law." *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980); *Merritt* v. *United States*, 267 U.S. 338, 341 (1925); *United States* v. *Algona Lumber Co.*, 305 U.S. 415, 418 (1939).

An implied-in-fact contract is an agreement "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore & O. R.R.* v. *United States*, 261 U.S. 592, 597 (1923). "An implied-in-fact contract is a true contract, containing all necessary elements of a binding agreement; it differs from other contracts only in that it has not been committed to writing or stated orally in express terms, but rather is inferred from the conduct of the parties in the milieu in which they dealt." *Bloomgarden* v. *Coyer*, 479 F.2d 201, 208 (D.C. Cir. 1973) (footnote omitted). See also, *e.g.*, *Somali Development Bank* v. *United States*, 508 F.2d 817, 822 (Ct. Cl. 1974); *Algonac Manufacturing Co.* v. *United States*, 428 F.2d 1241, 1255 (Ct. Cl. 1970); *Kirk* v. *United States*, 451 F.2d 690, 695 (10th Cir. 1971); 1 A. Corbin, *Contracts* § 18 (1963 & Supp. 1980); 1 *Williston Contracts* § 3 (Jaeger ed. 1957 & Cum. Supp. 1981); *Restatement of Contracts* § 5, Comment (1932).

By contrast, a contract implied in law or a quasi-contract "is not a contract at all." *Bloomgarden* v. *Coyer*, *supra*, 479 F.2d at 208. "[I]t is an obligation that is created by the law without regard to expressions of assent by either words or acts." 1 A. Corbin, *Contracts* § 19, at 44 (1963). See also, *e.g.*, *Algonac Manufacturing Co.* v. *United States*, *supra*, 428 F.2d at 1255; *Fidelity & Deposit Co.* v. *Harris*, 360 F.2d 402 (9th Cir. 1966); 1 *Williston*

on Contracts § 3A (Jaeger ed. 1957 & Cum. Supp. 1981); *Restatement of Contracts* § 5, Comment (1932). "Quasi contractual obligations are imposed by the law for the purpose of bringing about justice without reference to the intention of the parties." 1*Williston on Contracts* § 3A, at 13 (Jaeger ed. 1957).

In the present case, it is clear that what was labeled by the court of appeals as an implied-in-fact contract was, at best, a contract implied in law or quasi-contract. Respondent's complaint did not allege and the court of appeals did not find that there had been an actual agreement or meeting of the minds between the parties. Nor did respondent's complaint make any reference to his actual understanding of the terms of his employment when he was initially appointed to a position with the AAFES or when he was later designated for participation in the Executive Management Program. Instead, respondent merely alleged that his termination violated due process and the AAFES regulations governing discharge procedures, and the court of appeals found that a "contract" existed solely by virtue of those regulations and "the well-established legal principle that a federal agency is bound to follow its regulations where the rights of individuals are affected" (Pet. App. 9a).[10]

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[10] Neither of the two cases cited by the court below (Pet. App. 8a) supports its holding that the AAFES regulations governing discharge procedures gave rise to an implied-in-fact contract with its appointees. In *Aycock-Lindsey Corp.* v. *United States*, 171 F.2d 518 (5th Cir. 1948), which was decided prior to *Testan*, the regulation in question expressly provided for the payment of subsidies to individuals who complied with certain provisions of the Federal Soil Conservation and Domestic Allotment Act. The court did not suggest that a Tucker Act remedy on an implied-in-fact contract theory

Thus, the obligation that the AAFES was found to have incurred by the court of appeals was one "imposed by the law for the purpose of bringing about justice without reference to the intention of the parties" (1 *Williston Contracts* § 3A, at 13 (Jaeger ed. 1957)). Such an obligation is a "quasi-contract" or contract "implied in law." Because the Tucker Act does not confer jurisdiction with respect to claims founded upon a quasi-contract or contract implied in law, respondent's claims for monetary relief should have been dismissed.[11]

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could be based on an agency's failure to abide by regulations that made no reference to money payments. In *Bodek* v. *Department of Treasury*, 532 F.2d 277, 279 n.7 (2d Cir. 1976), the court merely stated that certain "Treasury regulations are considered an implied part of the contract between the United States and a purchaser of its bonds." Obviously, holding that regulations are considered an implied part of an express contract is far different from holding that regulations themselves give rise to an implied-in-fact contract.

By the same token, cases such as *Morton* v. *Ruiz*, 415 U.S. 199 (1974), and *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), on which the court of appeals relied (Pet. App. 9a), merely state a rule of administrative law and do not suggest that the government's failure to abide by its regulations constitutes a breach of contract giving rise to a claim for damages. See *United States* v. *Caceres*, 440 U.S. 741, 754 (1979).

[11] Although sovereign immunity bars respondent's claims for monetary relief, he is hardly left remediless. The court of appeals held that jurisdiction exists with respect to his claims for nonmonetary relief, including reinstatement, accrued vacation time, and sick leave. That holding is not challenged here. See page 6, note 3, *supra*. Moreover, respondent's discharge has already been subjected to detailed administrative review at several levels. However, monetary relief for wrongfully discharged AAFES employees must await congressional action. Should Congress wish to provide for such relief, it could do so simply by including AAFES employees within the coverage of the Back Pay Act.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to dismiss, for lack of jurisdiction, those portions of the complaint seeking monetary relief.

Respectfully submitted.

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